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No. 02-1192

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER

v.

AVIALL SERVICES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a party that is potentially liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, for cleanup of property contaminated by hazardous substances, but has not been sued under CERCLA to undertake or to pay for the cost of the cleanup, may nevertheless seek contribution under CERCLA from other jointly responsible parties.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. The petition for a writ of certiorari presents the question whether a party that is potentially liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, for cleanup of property contaminated by hazardous substances may seek contribution from other jointly responsible parties in the absence of a CERCLA suit that would determine and discharge the underlying liability. The United States submits that the court of appeals' divided en banc decision, which holds that a contribution action is available in that situation, is mistaken and that this Court should grant the petition to resolve that important and unsettled issue.

STATEMENT

Aviall Services, Inc., sued Cooper Industries, Inc., in the United States District Court for the Northern District of

Texas to recover expenses that Aviall has incurred in cleaning up property Aviall purchased from Cooper. During their respective ownerships, Cooper and Aviall each disposed of hazardous substances at the site. Aviall asserted that Section 107 of CERCLA, 42 U.S.C. 9607, subjects Aviall and Cooper to joint and several liability for the cleanup, and it claimed that Section 113(f)(1) of CERCLA, 42 U.S.C. 9613(f)(1), therefore renders Cooper liable to Aviall for contribution. The district court dismissed that claim without prejudice, ruling that, unless and until Aviall is itself subject to suit under CERCLA, it cannot seek contribution from other potentially liable parties. Pet. App. 90a-100a. A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed that judgment. *Id.* at 47a-89a. The en banc court of appeals, in a divided decision, vacated the panel's judgment and reversed. *Id.* at 9a-45a.

A. The CERCLA Liability Scheme

Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA, as amended and expanded through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, "grants the President broad power to command government agencies and private parties to clean up hazardous-waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). It "both provides a mechanism for cleaning up hazardous waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted); see H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 3, at 15 (1985) ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.").

CERCLA provides the President (acting primarily through the Environmental Protection Agency (EPA), see Exec. Order No. 12,580, 3 C.F.R. 193 (1987)), with alternative means for cleaning up contaminated property. Section 104 of CERCLA authorizes EPA itself to undertake response actions designed to remove hazardous substances and provide appropriate remediation, using the Hazardous Substance Superfund. See 42 U.S.C. 9604; see also *Bestfoods*, 524 U.S. at 55. Alternatively, Section 106(a) authorizes EPA to compel, by means of an administrative order or a request for judicial relief, the responsible parties to undertake response actions, which the government then monitors. See 42 U.S.C. 9606(a). Under either approach, the United States may recover its response costs from responsible parties through a cost recovery action under Section 107(a). See 42 U.S.C. 9607(a).

Section 107(a) authorizes the United States, as well as other entities, to seek recovery of cleanup costs from four categories of "covered persons"—sometimes referred to as "potentially responsible parties" or "PRPs"—associated with the release or threatened release of hazardous substances. 42 U.S.C. 9607(a). Those entities are: (1) owners and operators of facilities at which hazardous substances are located; (2) past owners and operators of such facilities at the time hazardous substances were disposed; (3) persons who arranged for disposal or treatment of hazardous substances; and (4) certain transporters of hazardous substances to the site. 42 U.S.C. 9607(a)(1)-(4). Congress has broadly defined the pertinent statutory terms—including "facility," "hazardous substance," "owner or operator," "person," "release," "transport," and "disposal"—to reach a wide range of entities and activities. See CERCLA § 101(9), (14), (20)-(22), (26) and (29), 42 U.S.C. 9601(9), (14), (20)-(22), (26) and (29).

Section 107(a) of CERCLA specifically provides that the United States, individual States, and Indian tribes are entitled to recover from covered persons "all costs of removal or

remedial action incurred" that are "not inconsistent with the national contingency plan." CERCLA § 107(a)(1)-(4)(A), 42 U.S.C. 9607(a)(1)-(4)(A). The national contingency plan consists of federal regulations that prescribe the procedure for conducting hazardous substance cleanups under CERCLA and other federal laws. See CERCLA § 105, 42 U.S.C. 9605; 40 C.F.R. Pt. 300; see also CERCLA § 101(23), (24) and (31), 42 U.S.C. 9601(23), (24) and (31); Clean Water Act of 1977 (CWA) § 311(c) and (d), 33 U.S.C. 1321(c) and (d).

CERCLA also authorizes entities other than the United States, individual States, and Indian tribes to recover their costs of cleaning up contaminated property under certain circumstances. For example, a party that complies with a government order under Section 106(a) to respond to an actual or threatened release of hazardous substances may petition the government for reimbursement of its expenses on the ground that it is not liable for the response costs or that the government's decision in selecting a response action was arbitrary and capricious or otherwise not in accordance with law. See CERCLA § 106(b), 42 U.S.C. 9606(b). If the government denies the petition, the party may file a judicial action seeking reimbursement. See CERCLA § 106(b)(2)(B), 42 U.S.C. 9606(b)(2)(B).

In addition, Section 107 of CERCLA provides that persons "other" than the United States, an individual State, or an Indian tribe may recover "any other necessary costs of response" that are incurred "consistent with the national contingency plan." CERCLA § 107(a)(1)-(4)(B), 42 U.S.C. 9607(a)(1)-(4)(B). The courts of appeals have ruled that persons who are not themselves liable may clean up contaminated property and then invoke this provision to seek reimbursement from the same four categories of potentially liable parties that are subject to government cleanup actions.[1] The

[1] See *In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997); *Rumpke of Ind., Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1241-1242 (7th Cir. 1997); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United Techs. Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

courts of appeals have uniformly concluded, however, that a person who falls within one of those four categories cannot rely on Section 107(a) to seek full cost recovery on a theory of joint and several liability from another jointly liable party; rather, a party that is subject to CERCLA liability is limited to seeking contribution from other jointly liable parties in accordance with Section 113(f).[2]

Section 113(f), which Congress added as part of the 1986 SARA amendments, explicitly addresses when a potentially liable party may seek contribution. See 42 U.S.C. 9613(f). Section 113(f)(1) provides in pertinent part:

> Any person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]. * * * Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [Section 106] or [Section 107].

42 U.S.C. 9613(f)(1). Section 113(f)(2) additionally states that a party that resolves its liability to the United States or a State through an administrative or judicially approved settlement shall not be subject to contribution "regarding mat-

[2] See, *e.g.*, *Bedford Affiliates* v. *Sills*, 156 F.3d 416, 423-425 (2d Cir. 1998); *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir.), cert. denied, 525 U.S. 963 (1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1121-1123 (3d Cir. 1997); *Redwing Carriers, Inc.*, 94 F.3d at 1496; *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *United States* v. *Colorado & E. R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Techs. Corp.*, 33 F.3d at 103; *Akzo Coatings, Inc.*, 30 F.3d at 764.

ters addressed in the settlement." 42 U.S.C. 9613(f)(2). Section 113(f)(3)(B) further provides:

> A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

42 U.S.C. 9613(f)(3)(B). See CERCLA § 122, 42 U.S.C. 9622 (governing CERCLA settlements).[3]

The central issue in this case is whether Section 113(f) authorizes a party that is potentially subject to CERCLA liability, but has not been sued under Section 106 or 107(a) of CERCLA and has not resolved its CERCLA liability through an administrative or judicially approved settlement, to seek contribution under CERCLA from another jointly liable party.

B. The Facts And Proceedings Below

Aviall provides aircraft maintenance services. In 1981, it purchased Cooper's aircraft engine maintenance business through an asset purchase agreement. Aviall later discovered hazardous substance contamination, allegedly arising from the activities of both Aviall and Cooper, at Texas facilities acquired from Cooper. Aviall notified Texas environmental authorities of the contamination. Those authorities confirmed that Aviall was in violation of state environmental laws and directed the company to take corrective actions. In 1984, Aviall commenced cleanup activities, and, in 1995, it contacted Cooper seeking reimbursement for the response costs. Aviall later sold the facilities, but remained contractually responsible for the cleanup. Pet. App. 10a, 48a, 91a.

[3] Section 122(a) authorizes the President (or his delegate) to enter into an agreement with persons (including responsible parties) to perform response actions if the President determines such action will be done properly by such person. 42 U.S.C. 9622(a). Section 122(d) provides that such agreements, other than "de minimis settlements" under Section 122(g), shall generally be entered in the appropriate United States district court as a consent decree. 42 U.S.C. 9622(d); see 42 U.S.C. 9622(g). Section 122(g) "de minimis settlements," 42 U.S.C. 9622(g), and Section 122(h) settlements, reached by the head of any department or agency with authority to undertake response action, 42 U.S.C. 9622(h), may be embodied in an administrative order. See CERCLA § 122(i), 42 U.S.C. 9622(i).

Aviall commenced this action against Cooper in federal district court to obtain recovery of its cleanup expenditures. Aviall's complaint alleged that Cooper had breached its contractual and warranty obligations under the asset purchase agreement. Pet. App. 91a-92a. In addition, although neither the United States nor Texas had sued Aviall to compel cleanup or to recover response costs, Aviall asserted that Cooper was liable to Aviall for contribution under Section 113(f) of CERCLA and Texas law. *Ibid.* The CERCLA contribution claim provided the sole basis for federal jurisdiction. *Id.* at 98a-99a.

The district court rejected Aviall's CERCLA contribution claim. The court concluded that "[t]he plain language of § 113(f)(1) provides that contribution claims may only be brought '*during* or *following* any civil action under [§ 106] or under [§ 107(a)].' (emphasis added)." Pet. App. 94a. The court additionally concluded that the last sentence of Section 113(f)(1) is merely a savings clause that preserves independent contribution remedies so that "parties who cannot fulfill the prerequisites of § 113(f)(1) are not precluded from bringing contribution claims that are otherwise available, such as under state law." *Ibid.* The district court accordingly dismissed Aviall's CERCLA contribution claim, but without prejudice in the event that a Section 106 or 107 action were brought against Aviall in the future. *Id.* at 97a-98a & n.4. The court declined to retain federal jurisdiction over the remaining state law claims. *Id.* at 99a-100a.

A divided panel of the court of appeals affirmed. Pet. App. 47a-89a. The majority concluded that, "as a matter of

statutory text and structure, CERCLA requires a party seeking contribution to be, or have been, a defendant in a § 106 or § 107(a) action." *Id.* at 57a; see *id.* at 52a-56a. The majority, like the district court, construed the final sentence of Section 113(f)(1) as merely a "savings clause" that preserved independent bases for contribution, such as Aviall's contribution claims against Cooper under Texas law. *Id.* at 56a. The majority also stated that the legislative history of CERCLA, prior CERCLA decisions, and the policy goals of CERCLA all supported its construction of the statutory text. *Id.* at 57a-66a. Judge Wiener dissented, reasoning that the first sentence of Section 113(f)(1) does not categorically require that a party seek contribution in response to a Section 106 or 107(a) action and that the final sentence of Section 113(f) explicitly authorizes a party to seek contribution in the absence of such suits. *Id.* at 66a-78a. Judge Wiener also stated that the legislative history, case law, and policy arguments supported his construction. *Id.* at 78a-89a.

The court of appeals granted Aviall's petition for rehearing en banc "[b]ecause of the importance of this question to the allocation of financial responsibility for CERCLA cleanups." Pet. App. 12a, 46a. The en banc court, by a divided vote, reversed the judgment of the district court. *Id.* at 9a-45a. The majority adopted the reasoning of Judge Weiner and concluded:

> [S]ection 113(f)(1) does not constrain a PRP for covered pollutant discharges from suing other PRPs for contribution only "during or following" litigation commenced under sections 106 or 107(a) of CERCLA. Instead, a PRP may sue at any time for contribution under federal law to recover costs it has incurred in remediating a CERCLA site. Section 113(f)(1) authorizes suits against PRPs in both its first and last sentence which states without qualification that "nothing" in the section shall "diminish" any person's right to bring a contribution action in the absence of a section 106 or section 107(a) action.

Pet. App. 13a-14a. Judge Emilio Garza, joined by Judges Smith and Barksdale, dissented, concluding that "the plain language and statutory structure of CERCLA's contribution provisions demonstrate that the contribution remedy in § 113(f)(1) requires a prior or pending § 106 or § 107 action." *Id.* at 41a-42a.

DISCUSSION

The en banc court of appeals has misconstrued CERCLA's contribution provisions. By its plain language, Section 113(f)(1) provides a party that is jointly liable for response costs under CERCLA with a right to contribution, but only "during or following" a Section 106 or Section 107(a) civil action that would quantify and resolve that liability. Section 113(f)(1)'s savings clause does not negate that express limitation, but instead preserves any additional rights to contribution that a party may have under other laws. The en banc court's erroneous decision conflicts with the plain language of the statute and endorses an interpretation of CERCLA that has broad repercussions on the allocation of financial responsibility for CERCLA cleanups. Because the issue is important and recurring, and the court of appeals' decision endorses an unauthorized invocation of federal court jurisdiction, this Court should grant the petition for a writ of certiorari.

A. The Court Of Appeals Erred In Construing CERCLA's Contribution Provisions

CERCLA subjects parties that have contributed to the release or threatened release of hazardous substances to liability for the resulting response costs. CERCLA §§ 106, 107(a), 42 U.S.C. 9606, 9607(a). CERCLA, which operates against a "venerable common law backdrop," *Bestfoods*, 524 U.S. at 62, subjects a responsible party to joint and several

liability in accordance with common law principles if the harm from the release of hazardous substances is not divisible, and it provides a corresponding statutory right of contribution from other jointly liable parties. CERCLA § 113(f), 42 U.S.C. 9613(f). See *Key Tronic Corp.*, 511 U.S. at 816.[4]

Section 113(f)(1) of CERCLA explicitly identifies the circumstances in which a jointly liable party may seek contribution:

> Any person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], *during or following any civil action under [Section 106] or under [Section 107(a)]*.

42 U.S.C. 9613(f)(1) (emphasis added). Consistent with the traditional understanding of contribution principles, that provision allows a jointly responsible party to seek contribution, but only "during or following" a Section 106 or Section 107(a) civil action that would quantify and resolve the joint liability it seeks to apportion among other responsible parties. See *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 87-88 (1981) ("Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors *has paid* more than his fair share of the common liability." (emphasis added)).[5]

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[4] See, *e.g.*, *Centerior Serv. Co.*, 153 F.3d at 348; *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 721-722 (2d Cir. 1993); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 268-269 (3d Cir. 1993); *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *United States* v. *Monsanto Co.*, 858 F.2d 160, 167, 172 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

[5] See also, *e.g.*, *United Techs. Corp.*, 33 F.3d at 99 ("Contribution is a standard legal term that enjoys a stable, well-known denotation. It refers to a claim 'by and between jointly and severally liable parties for an appropriate division of the payment one of them *has been compelled to make*.' ") (emphasis added) (quoting *Akzo Coatings, Inc.*, 30 F.3d at 764); Restatement (Third) of Torts § 23 comment b (1999) ("A person seeking contribution *must extinguish the liability* of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment.") (emphasis added); Uniform Contribution Among Tortfeasors Act § 1(d), 12 U.L.A. 123 (1955) (accord); *Black's Law Dictionary* 328 (6th ed. 1990) (defining contribution as a right "of one *who has discharged a common liability* to recover of another, also liable, the aliquot portion which he ought to pay or bear") (emphasis added).

The court of appeals concluded (Pet. App. 24a-25a) that the first sentence of Section 113(f)(1) allows contribution actions in the absence of an ongoing or completed Section 106 or 107(a) action on the mistaken ground that if Congress had not intended to authorize such actions it would have provided that contribution actions shall "only" be brought during or following a Section 106 or Section 107(a) action. Pet. App. 24a-25a. Congress's intentions, however, are clear from the plain language of the statutory text. Section 113(f)(1)'s permissive phrasing—a "person *may* seek contribution"—indicates that Congress intended to permit contribution claims to be brought when the stated prerequisites—namely, that contribution be sought "during or following" a Section 106 or Section 107(a) action—are satisfied. It does *not* provide authorization for contribution claims where those prerequisites are *not* satisfied. The court of appeals' contrary interpretation renders the "during or following" requirement entirely superfluous, in violation of basic canons of statutory construction. See, *e.g.*, *Dole Food Co.* v. *Patrickson*, 123 S. Ct. 1655 (2003); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992).[6]

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[6] Contrary to the court of appeals' suggestions, Section 113(f)(1)'s syntax is not "confused" and its grammar is not "inexact." Pet. App. 13a. Rather, Section 113(f)(1) speaks unambiguously through the familiar syntax and grammar that is routinely employed in granting a permissive, but limited, license. For example, a sign stating that "Visitors May Enter

The court of appeals also mistakenly relied (Pet. App. 25a-27a) on the last sentence of Section 113(f)(1), which provides that "[n]othing in this subsection shall *diminish the right* of any person to bring an action for contribution in the absence of civil action under [Section 106] or [Section 107]." 42 U.S.C. 9613(f)(1) (emphasis added). The court erroneously construed that sentence, which is clearly written in the form of a "savings" clause, as affirmatively creating a right to contribution. The specific terms of the savings provision, however, merely preserve any *independent* right to contribution that exists apart from Section 113(f)(1), such as the state law right to contribution that Aviall invoked in this very case (Pet. App. 91a). See *United States* v. *Locke*, 529 U.S. 89, 105 (2000).[7]

Through The Front Door During Normal Business Hours" informs the visitor that, if he wants to enter through the front door, he must do so during the prescribed period. It does not grant the visitor the right to use the front door at any time he wishes. See Pet. App. 34a-35a (Garza, J., dissenting).

[7] The court of appeals suggested that Congress added the last sentence of Section 113(f)(1) to indicate that the federal courts "had been right," in CERCLA cases decided before Congress added Section 113(f)(1) through the 1986 SARA amendments, in engrafting an implied federal common law right of contribution onto CERCLA. Pet. App. 26a. The court's reasoning, however, rests on a mistaken understanding of the pre-SARA caselaw and, in any event, is unpersuasive. As the First Circuit explained in *United Technologies*, the pre-SARA courts were divided on the question whether there was an implied right to contribution under CERCLA. 33 F.3d at 100. Those lower courts that did recognize such a right employed the term "contribution" in its "traditional legal sense." *Id.* at 100-101. As the First Circuit also explained, the term contribution is traditionally understood to denote "a claim 'by and between jointly and severally liable parties for an appropriate division of the payment one of them *has been compelled to make*.'" *Id.* at 99. See note 5 , *supra*. Congress expressly provided for contribution under those circumstances through the first sentence of Section 113(f)(1) by allowing contribution "during or following" a Section 106 or 107(a) action. If Congress had intended to create an even broader form of contribution, it would have written the first sentence of Section 113(f)(1) to accomplish that result. It would not have perpetuated the pre-SARA uncertainty by depending on courts to fashion a novel form of contribution, foreign to traditional legal understanding, through Section 113(f)(1)'s savings clause. See, *e.g.*, *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them").

In addition to misconstruing Section 113(f)(1), the court of appeals overlooked the significance of Section 113(g)(3), which addresses the limitations periods for contribution actions. See 42 U.S.C. 9613(g)(3). As previously explained (pp. 5-6, *supra*), Section 113(f)(1) expressly allows contribution "during or following" a Section 106 or 107(a) civil action, while Section 113(f)(3)(B) expressly allows contribution after an administrative or judicially approved settlement. See 42 U.S.C. 9613(f)(1) and (3)(B). Section 113(g)(3) provides two corresponding limitations periods:

> No action for contribution for any response costs or damages may be commenced more than 3 years after—
>
> (A) the date of judgment in any action under [CERCLA] for recovery of such costs or damages, or
>
> (B) the date of an administrative order under [Section 122(g)] (relating to de minimis settlements) or [Section 122(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. 9613(g)(3). Section 113(g)(3)(A) thus establishes a three-year limitations period for contribution actions brought "during or following" a Section 106 or 107(a) action, while Section 113(g)(3)(B) designates a three-year limitations period for contribution actions brought after the party has resolved its liability through an administrative or judicially approved settlement. But Section 113(g)(3) does *not* provide a limitations period for contribution actions in the absence of a Section 106 or 107(a) action or a settlement,

which indicates that Congress did not intend to create a federal right to contribution in that situation.

The plain language of Section 113(f)(1), particularly when read in light of Section 113(g)(3), conclusively establishes that a party may not seek contribution under CERCLA in the absence of a Section 106 or 107(a) action. There accordingly is no need to resort to legislative history to answer that question. But in any event, the legislative history includes committee reports and statements in the floor debates indicating that contribution is not available in the circumstances presented here. The pertinent Senate and House bills that ultimately became SARA contained differently worded contribution provisions. But each chamber indicated that the object was to provide for contribution during or following a Section 106 or 107(a) action or after a CERCLA-based settlement.[8]

[8] The Senate bill initially provided that a contribution action may be brought "[a]fter judgment in any civil action under section 106 or under [Section 107(a)]." See S. Rep. No. 11, 99th Cong., 1st Sess. 103 (1985) (proposed Section 107(*l*)(2)). The Senate report stated that "[t]his amendment clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." *Id.* at 44 (emphasis added). The Senate later revised its proposed language through a floor amendment to allow contribution "during or following" a Section 106 or 107(a) action so that contribution claims could be resolved in one suit. See 131 Cong. Rec. 24,449 (1985). The sponsors explained that the floor amendment would allow "any defendant in a Government enforcement action under CERCLA * * * to file a claim for contribution against others * * * *as soon as the enforcement action has been brought.*" *Id.* at 24,450 (Sen. Stafford) (emphasis added); see also *id.* at 24,452 (Sen. Thurmond); *id.* at 24,453 (Sen. DeConcini). The House bill initially provided that "any defendant alleged or held to be liable in an action under section 106 or section 107" may bring a contribution action. See H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 1, at 13 (1985) (proposed Section 113(g)(1)). Like the Senate report, the House report stated that the proposed language "clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." *Id.* at 79 (emphasis added). The House Judiciary Committee later made minor "technical" changes to the House bill that "simply clarif[y] and emphasize[] that persons who settle with EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties." H.R. Rep. 253, *supra*, Pt. 3, at 18. The House-Senate conference, which produced the final language, adopted without further pertinent elaboration the Senate's "during or following" formulation and the House provisions allowing contribution following settlement. See H.R. Rep. No. 962, 99th Cong., 2d Sess. 37, 222 (1986).

Similarly, the court of appeals' reliance on "policy considerations" (Pet. App. 31a) is misplaced. Congress expressed the controlling policy through Section 113(f)(1)'s text, which adopts the traditional practice of allowing a party to seek contribution only if that party is itself subject to suit. The judiciary's task is "to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entm't Group*, 493 U.S. 120, 126 (1989). The congressional judgment set forth in the statutory text accordingly should control. See, *e.g.*, *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). See also Pet. App. 44a-45a (Garza, J., dissenting).[9]

[9] CERCLA seeks to encourage voluntary private party cleanups, but there is no evidence in the record of this case to support the court of appeals' assumption (Pet. App. 31a) that the availability of a contribution action in the absence of a Section 106 or 107(a) suit is critical in encouraging such cleanups. Even if the court's assumption were correct, contribution under those circumstances poses a heightened risk that the contributing party may be subject to double liability. Under CERCLA, a responsible party's voluntary cleanup does not discharge the underlying liability to the government except as provided in a settlement or federal court judgment to which the government is a party. 42 U.S.C. 9613(f)(2). Hence, a party that is ordered to pay "contribution" in the absence of such a resolution has no guarantee that its payment will discharge its liability and remains potentially subject to a future government cost recovery action if any relevant government agency later investigates and determines that the voluntary conduct is inadequate or improper. See Restatement (Third) of Torts § 23 (1999), Reporter's Note, cmt. b ("A person seeking contribution must extinguish the liability of the person against whom contribution is sought. See Uniform Contribution Among Tortfeasors Act § 1(d). Otherwise, the person against whom contribution is sought would be subject to double liability.").

B. This Court Should Grant The Petition For A Writ Of Certiorari

The court of appeals granted en banc review on the issue in this case "[b]ecause of the importance of this question to allocation of financial responsibility for CERCLA cleanups." Pet. App. 12a. The issue here is indeed important, and the en banc court's erroneous resolution augments its significance. The court of appeals' decision allows the unauthorized invocation of federal court jurisdiction, endorses a mistaken view of the CERCLA liability scheme, and condones the unauthorized imposition of financial liability under federal law. The en banc Fifth Circuit is the first court to address the issue squarely in a concrete context, but its decision is inconsistent with the statutory restrictions respecting contribution under the CERCLA liability scheme. There is little to be gained in allowing a new federal cause of action to continue in existence before correcting the court's erroneous interpretation.

As explained above, ten courts of appeals have uniformly ruled that Section 107(a)(1)-(4)(B) of CERCLA allows a "person" that falls within one of CERCLA's four categories of liable parties to obtain a recovery from another jointly liable party only through a contribution action under Section 113(f). See 42 U.S.C. 9607(a)(1)-(4)(B); pp. 4-5 & note 2, *supra*. That result avoids the anomaly of a jointly liable party suing another jointly liable party for the full costs of a CERCLA cleanup. It also ensures that parties that have settled with the government and received protection from "claims for contribution regarding matters addressed in the settlement," CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2), are not subject to double liability through a Section 107(a) suit on the theory that such a suit imposes direct liability rather than contribution.[10]

[10] The United States endorsed the uniform conclusion of the courts of appeals on this issue in its response to an order of this Court inviting the United States' views on a petition for writ of certiorari filed in *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998) (No. 97-795). In that case, the court of appeals ruled that a private party that was concededly liable for the costs of responding to hazards at a mine site under CERCLA could not recover its cleanup costs by bringing an action against other responsible parties seeking to hold them jointly and severally liable for those expenses. The United States urged the Court to deny certiorari on the ground that the courts of appeals were in agreement that a potentially responsible party must sue for contribution under Section 113(f), stating:

> Section 107(a)(4)(B) of CERCLA provides that a responsible private party shall be liable for "necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(B). Section 107(a)(4)(B)'s reference to "any other person" is broad enough to allow one jointly responsible party to sue another for the former's response costs. See *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 (1994) (Section 107 "impliedly authorizes private parties to recover cleanup costs from other PRPs."). Section 107(a)(4)(B) does not describe, however, what form that liability should take. *Key Tronic*, 511 U.S. at 818 & n.11. Section 113 fills that void. When read in combination, the clear implication of Sections 107(a)(4)(B) and 113 is that the jointly responsible party is limited to seeking contribution in accordance with Section 113(f).

Brief for the U.S. as Amicus Curiae at 10, *Pinal Creek Group*, *supra* (No. 97-795). Since the early stages of this litigation, Aviall has predicated its contribution claim on that understanding of the relationship between Section 107(a) and Section 113(f). See Pet. App. 94a ("Aviall has dropped the independent § 107(a) claim and instead asserts a so-called 'combined' § 107(a) and § 113(f)(1) claim.").

As a practical matter, the uniform view of the courts of appeals that a responsible party can seek reimbursement for response costs under CERCLA only through a contribution action, when coupled with the understanding that a responsible party may seek contribution under CERCLA only "during or following" a Section 106 or 107(a) action or after settlement, imposes a coherent structure on the allocation of CERCLA response costs and a sensible limitation on CERCLA contribution suits. That construction ensures that CERCLA does not create a free-ranging federal cause of action under which responsible parties may sue each other at

any time for damages they jointly caused. Rather, a responsible party that satisfies its CERCLA liability to the government, through settlement or judgment, may obtain contribution from other responsible parties within a statutorily prescribed limitation period. That construction also puts CERCLA in alignment with the traditional legal rules governing joint liability and contribution.[11]

The en banc court's contrary conclusion that CERCLA authorizes responsible parties to bring federal suits for contribution whenever they please endorses errant CERCLA-based contribution suits, subject to no express limitation period, arising out of the many contaminated sites throughout the Nation. See General Accounting Office, *Community Development: Local Growth Issues—Federal Opportunities and Challenges* (RCED-00-178) 118 (Sept. 2000). The federal courts face a substantial burden in resolving those complex cases, in which they confront the conceptually awkward task of ordering a responsible party to pay "contribution" to another responsible party when the joint liability they potentially owe to the federal or state government under CERCLA has not been discharged. See note 9, *supra*.[12]

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[11] See Restatement (Third) of Torts § 23 cmt. b (1999) ("A person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment."); see also p. 10 & note 5, *supra*. That construction also allows a responsible party to clean up a CERCLA site voluntarily and apportion the costs among other responsible parties by entering into a settlement with the federal or state government to resolve its CERCLA liability, to the extent practicable within government resources. If a party enters into such a settlement, it would then be immune from contribution claims regarding matters addressed in the settlement, and it would have the express right to seek contribution from non-settling responsible parties, based on its discharge of the joint liability through the settlement. See CERCLA § 113(f)(2) and (3), 42 U.S.C. 9613(f)(2) and (3).

[12] Upon examination of the issue, Congress might wish to create an appropriate remedy, apart from contribution under Section 113(f), for responsible persons who engage in voluntary cleanups and seek to recover their costs from other responsible persons. A properly fashioned remedy could further Congress's objective of facilitating cleanup of "brownfields" sites, without requiring government enforcement actions or settlements and the resulting expenditures of limited government resources. See Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356. But as this Court noted in the context of CERCLA's provisions respecting recovery of attorney's fees, the matter "is a policy decision that must be made by Congress, not by the courts." See *Key Tronic Corp.*, 511 U.S. at 819, n.13 (quoting *FMC Corp.* v. *Aero Indus., Inc.*, 998 F.2d 842, 847 (10th Cir. 1993)).

Aviall's suit illustrates some of the potential problems posed by such CERCLA contribution claims. Aviall initially characterized its suit as "primarily, but not exclusively, a contract case," Pet. App. 92a, and the district court properly determined that the suit should be resolved in state court, *id.* at 99a-100a. In reversing, the en banc court opened the door for Aviall, or any other owner of a contaminated site, to bypass the state courts and initiate a federal suit, ostensibly for CERCLA "contribution," to recover expenditures for cleanup activities as CERCLA response costs. The federal courts will be responsible for applying CERCLA's complex provisions to what even Aviall characterized as "primarily" state law contract claims. It appears highly improbable that Congress intended for CERCLA to expand so dramatically the jurisdiction of the federal courts, when CERCLA's text gives the federal courts a far more structured and limited role. See *Rumpke of Ind., Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997) ("a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available").

This Court may, of course, allow the issue in this case to "percolate" in the lower courts until a conflict among the courts of appeals develops. But as *Rumpke* forebodes, and in view of the inevitably recurring nature of the issue, the prospects are high that a circuit split will emerge. The ensuing percolation is likely to impose a substantial cost on an

already overtaxed federal judiciary. Not only are there a substantial number of potential plaintiffs who may have an incentive to bring such suits, but those suits, which typically involve multiple parties, are inherently complex. They usually involve difficult questions of allocating necessary response costs based on expert testimony, including scientific inquiry about conditions at the site. And, as this case illustrates, they may import, through the federal court's supplemental jurisdiction, state law issues that would normally be resolved in state court.

In short, if the United States is correct that CERCLA does not authorize contribution claims in these circumstances, then allowing such litigation to go forward will result in a wasteful expenditure of time and resources for all concerned. This question is best resolved sooner rather than later, and it is sufficiently important to warrant resolution now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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